

## **The Pedra Branca/Pulau Batu Puteh Case at the International Court of Justice (ICJ): Some Observations**

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### **Introduction**

Southeast Asia is saddled with numerous conflicting maritime claims which have arisen as a result of historical factors as well as the implementation on the United Nations Convention of the Law of the Sea (UNCLOS) by member states in the region.<sup>1</sup> These overlapping claims relate to maritime features such as islands and rocks, as well as national territorial waters of 12 nautical miles and the Exclusive Economic Zone (EEZ) which extends to 200 nautical miles from the national baseline of a particular country. At the moment, the major areas of dispute are in the Straits of Malacca, South China Sea, Natuna Sea, Celebes Sea and Sulu Sea. Such disputes also abound in other regions such as in North-East Asia. These claims, often taking a very strong nationalist fervour, have led to heightened inter-state tensions due to strategic and economic importance of these maritime features.

Malaysia entered into an era of strained relations with almost all of its neighbours over maritime claims beginning in 1969, when it started delimiting its Continental Shelf boundaries with Indonesia. In the process of this delimitation exercise, both countries advanced rival sovereignty claims over the Sipadan and Ligitan islands on the north-east coast of Borneo. Although bilateral negotiations failed to resolve the issue, the two countries nevertheless went ahead with the signing of the Continental Shelf Treaty in 1969 and agreed to discuss the ownership of the two islands at a later date.<sup>2</sup> Further bilateral talks proved futile and as a result, the case was referred to the International Court of Justice (ICJ) for settlement in 1998. On 17 December 2002, the ICJ in its judgment, awarded sovereignty over the two islands to Malaysia.<sup>3</sup>

More trouble was in store for Malaysia when it published a map on 21 December 1979 entitled *Territorial Waters and Continental Shelf Boundaries of Malaysia*. One dispute that developed as a consequence of this map was conflicting claims of sovereignty by both Singapore and Malaysia over Pedra Branca/Pulau Batu Puteh. Meanwhile, the United Nations Convention on the Law of Sea treaty was concluded in 1982 and came into force in 1994. Malaysia and most of the Association of Southeast Asian Nations (ASEAN) member countries are signatories to the Convention. The Law of the Sea regime immediately caused a flurry of activity in Southeast Asia and South China Sea, with every nation parceling out seas and oceans into their respective EEZs. One flashpoint that resulted as a consequence of the overlapping of EEZs, in which Malaysia is also embroiled, is the Spratly Islands dispute in the South China Sea. Together with Malaysia, there are six claimants

involved in the dispute which continues to simmer without much hope of an amicable settlement in the near future.

Within ASEAN itself, there is a strong desire to establish mechanisms and processes for dispute settlement in the region. In 2003, at the 9th ASEAN Summit in Bali, ASEAN leaders identified the High Council of the Treaty of Amity and Cooperation in Southeast Asia (1976) as the main organ for the job. An ASEAN Maritime Forum was also created at the same summit, mainly to tackle the rising number of maritime territorial disputes in Southeast Asia.<sup>4</sup> Despite the ongoing efforts for greater integration in ASEAN, its members do not seem to have full trust in each other or even in the abilities of ASEAN. In the case of Pulau Batu Puteh too, for example, both Malaysia and Singapore decided, in 1994, to submit the dispute before the ICJ for arbitration.

## **Background Information**

The dispute concerning the sovereignty over Pedra Branca/Pulau Batu Puteh started on 14 February 1980, when Singapore protested in a Diplomatic Note over the 1979 Malaysian Map which showed the island lying within Malaysian territorial waters. The issue of sovereignty over Middle Rocks and South Ledge only emerged on 6 February 1993 when Singapore first brought it up in conjunction with the Pedra Branca/Pulau Batu Puteh claim. As bilateral negotiations failed to resolve the issue, in 1994, both countries decided to refer the case to the ICJ for settlement. Subsequently, a Special Agreement for the above purpose was signed by both parties at Putrajaya on 6 February 2003 and filed with the Registry of the ICJ on 24 July 2003.<sup>5</sup>

In cases involving disputes concerning sovereignty over land, the ICJ gives particular importance to the date on which a dispute crystallises, known as the Critical Date. The Critical Date is important because in awarding sovereignty, the ICJ will only take into account acts performed by the contestants before that date. In this case, the ICJ decided that the Critical Date for Pedra Branca/Pulau Batu Puteh was 14 February 1980, while for Middle Rocks and South Ledge it was 6 February 1993.<sup>6</sup>

Both Malaysia and Singapore were required to submit their written pleadings from 25 March 2004 to 1 February 2005. The oral pleadings or public hearings took place from 6 November 2007 to 23 November 2007. The case was heard by a bench of 16 judges, presided over by the ICJ Vice-President, Judge Awn Shawkat Al-Khasawneh. As is the normal practice, both claimants are allowed to choose one ad hoc judge each to represent their country. Malaysia chose Judge Christopher John Robert Dugard while Singapore took Judge Sreenivasa Rao Pemmaraju.<sup>7</sup>

Judgment day was 23 May 2008, but because of the nature of the case involved and due to differing circumstances, three separate judgments were delivered. The court ruled, by a vote of 12: 4, that sovereignty over Pedra Branca/Pulau Batu Puteh belonged to Singapore. However, sovereignty over Middle Rocks was awarded to

Malaysia with 15 judges ruling in favour of Malaysia and one judge, Sreenivasa Rao Pemmaraju, dissenting. In the case of South Ledge, the court ruled 15: 1, that sovereignty over this feature belonged to the state in the territorial waters of which it is located.<sup>8</sup>

## **The Bases of the Opposing Claims and the ICJ's Judgment**

An examination into some details of the bases of the claims to sovereignty advanced by each party and the ICJ's handling of the evidence is extremely vital in understanding the issue. It must be emphasised that the court decided, at the very beginning, to treat the sovereignty issue separately for each of the three marine features involved. As such, an analysis and critical comments on each item will also be provided.

### **a. Pedra Branca/Pulau Batu Puteh**

The first item addressed here concerns the arguments put forward by both parties. Singapore's position was that Pedra Branca/Pulau Batu Puteh was an uninhabited feature which did not belong to any state (*terra nullius*). The British, searching for an island in the area to build a lighthouse, took possession of it during the period between 1847 and 1851, in accordance with the laws governing acquisition of territory operating at the time. As such, since then, the British Crown and subsequently Singapore, have been continually exercising "effective and peaceful exercise of State authority". Effectively, therefore, Singapore's contention was that, firstly, it had title to the island by virtue of lawful acquisition in the period between 1847 and 1851, and secondly, it had possession as a result of exercising acts *à titre de souverain* or acts consistent with sovereignty, ever since.<sup>9</sup>

On the other hand, Malaysia pegged its case on the grounds that it had original title to the island because Pedra Branca/Pulau Batu Puteh had always been part of the Kingdom of Johor. As Johor is part of Malaysia, therefore title was acquired through inheritance. Johor had never lost its title as it had never ceded or abandoned the island. As such, nothing has happened to displace Malaysia's sovereignty over the island. Singapore's presence on the island "for the sole purpose of constructing and maintaining a lighthouse there with the permission of the territorial sovereign is insufficient to vest sovereignty in it". Malaysia rejected Singapore's argument that the island was *terra nullius* and therefore could not have been taken by the British based on the laws of occupation.<sup>10</sup>

It can be seen from the above arguments that Malaysia did not opt for a fallback position on *effectivités*, although it did submit evidence on state acts and the ICJ gave due consideration to the evidence submitted.

Returning to Malaysia's defence, Malaysia tried very hard to prove that it had original title to Pedra Branca/Pulau Batu Puteh and never lost it. The evidence produced was able to convince the ICJ that Malaysia indeed held original title to the island at least till 1844. The Court's ruling was as follows:<sup>11</sup>

In the light of the forgoing, the Court concludes that Malaysia has established to the satisfaction of the Court that as of the time when the British started their preparations for the construction of the lighthouse on Pedra Branca/Pulau Batu Puteh in 1844, this island was under the sovereignty of the Sultan of Johor.

This ruling at once destroyed Singapore's argument that Pedra Branca/Pulau Batu Puteh was *terra nullius* and that it obtained title to the island as a result of Britain taking possession of it. An important question here is why did the ICJ chose 1844 as the terminal point concerning the possession of title by Malaysia? In fact, it may be concluded that the ICJ decided to abandon the title argument for both the contending parties as documentary evidence from 1844 onwards threw the issue into murky waters. The Court was of the view that the 1844 correspondence was extremely vague and inconclusive as to whether Pedra Branca/Pulau Batu Puteh was ceded to the British, as claimed by Singapore, or whether it was only leased, as claimed by Malaysia.

Although the original letters of Governor W. J. Butterworth to the Sultan and Temenggong of Johor relating to the intention of the British to erect a lighthouse on Pedra Branca/Pulau Batu Puteh could not be traced, similarly Malaysia was also unable to furnish documentary evidence of a subsequent agreement, similar to the Pulau Pisang lighthouse agreement in 1860, spelling out the exact obligations and powers of each party. In the absence of such evidence, the Court could not accept Malaysia's contention that Singapore was only given the right of a lighthouse operator.<sup>12</sup> Since the question of title could now no longer be determined definitely and was considered an unsafe ground to rely upon, the Court decided to judge the case based on the conduct of the Parties after 1844. The emphasis given by the Court in relation to this matter was as follows:

- (a) Were the acts of the British, and later Singapore, from 1844 to 1980 purely related to the operation and maintenance of the lighthouse on Pedra Branca/Pulau Batu Puteh, or were some of them also acts *à titre de souverain*?
- (b) Did Johor, and later Malaysia, conduct any acts *à titre de souverain* pertaining to Pedra Branca/Pulau Batu Puteh from 1844 to 1980?

With reference to the above exercise, the Court first reviewed evidence connected with the conduct of the Parties from 1850 to 1953. These were as follows: (a) the selection, construction and commissioning of the Horsburgh lighthouse on Pedra Branca/Pulau Batu Puteh from 1850-1851; and (b) the Straits lights system and constitutional developments in Malaysia and Singapore from 1927 to 1965.

On an overall basis, the Court did not find much to support Malaysia's *effectivités*, not even the presence of any Johor dignitary at the commissioning of the Horsburgh lighthouse on 15 October 1851.<sup>13</sup> The Court was also of the opinion that correspondence, legislation and historical developments during this period were inconclusive to prove, either Malaysia's or Singapore's, sovereignty over Pedra Branca/Pulau Batu Puteh.

The Court then turned its attention to the 1953 correspondence which was given a great deal of prominence by both parties. After hearing submissions from both sides which were protracted, the Court arrived at the conclusion that the Johor reply of 21 September 1953 with the following wording “that the Johor Government does not claim ownership of Pedra Branca” (para 196), was not an exercise of executive authority. As such, the Johor denial did not have a “conclusive legal effect on Johor. Rather it is a response to an enquiry seeking information” (para 227). The Court ruled “that denial cannot be interpreted as a binding undertaking” (para 229). However, the Court, in its final judgment on Pedra Branca/Pulau Batu Puteh gave a startlingly different opinion which is as follows:<sup>14</sup>

It is the clearly stated position of the Acting Secretary of Johor in 1953 that Johor did not claim ownership of Pedra Branca/Pulau Batu Puteh. *That statement has major significance* (author’s emphasis).

Obviously, even the ICJ, we can surmise, was not consistent with its findings and judgment. The Court then turned its attention to the conduct of the Parties after 1953 and this period proved to be crucial in determining whether sovereignty was to be awarded to Malaysia or Singapore. The various items and activities scrutinised by the Court were as follows:

**(i) Investigation by Singapore of Shipwrecks in the Waters around Pedra Branca/Pulau Batu Puteh**

The Court established that it was Singapore and not Malaysia that had been actively involved in this activity. Moreover, the only Malaysian protest against this conduct was in 2003, long after the Critical Date of 1980. The Court concluded that Singapore’s activities relating to investigation of shipwrecks gave “significant support to the Singapore case” (para 234).

**(ii) Control and Granting of Permission for Visits**

Singapore contended that it exercised exclusive control on visits to the island, whether undertaken by Singapore or Malaysian officials, citizens and institutions. At no time, Singapore argued, did Malaysia protest against Singapore’s requiring those officials to obtain permits from it. In fact, in 1978, Malaysian officials from the Survey Department were told to leave the island as they had not obtained proper permits from the relevant Singapore authorities (para 238). The Court accordingly ruled that Singapore’s conduct in this matter, were tantamount to acts *à titre de souverain* (para 239).

**(iii) Naval Patrols**

Another activity reviewed by the Court was naval patrols and exercises around Pedra Branca/Pulau Batu Puteh by Malaysia and Singapore. The Court found that this activity could not assist it in arriving at a verdict.

**(iv) Flying of Ensigns**

Singapore has been flying British and Singapore ensigns from the Horsburgh lighthouse from the time of its commissioning till the present. In connection, Malaysia had never protested, although it expressed concern in 1978. Singapore claimed such acts constituted a clear display of sovereignty. Malaysia, on the other hand, argued that the flying of an ensign is to be distinguished from flying the national flag. Ensigns, according to Malaysia, are not marks of sovereignty but of nationality. In its judgment, the Court seemed to have concurred with Malaysia's stand.

**(v) Installation of Military Communications Equipment by Singapore, 1977**

On May 1977, Singapore stated that it installed military communications equipment on the island for use by the Singapore Navy and Air Force and the installations was carried out openly. However, Malaysia contended that the installations were undertaken secretly and that Malaysia only became aware of it on receipt of Singapore's memorial. Malaysia considered this act as contravening the "consent given for construction and operation of the lighthouse" (para 247). It has been pointed out earlier that Malaysia was unable to produce evidence of an agreement spelling out the exact terms pertaining to the operation of the lighthouse. Malaysia kept on harping on the "consent given" but the Court had ruled that the 1844 replies from the Sultan and the Temenggong of Johor were extremely vague. The Court also ruled that Singapore's action in installing the military communications equipment on Pedra Branca/Pulau Batu Puteh was an act *à titre de souverain*.

**(vi) Singapore's Aborted Proposal for Reclamation, 1978**

Without going into details, in 1978 especially, Singapore made plans to extend the area of Pedra Branca/Pulau Batu Puteh by reclamation, and tenders were invited, although the plans were eventually shelved. On this point, the Court accepted this act as consistent with state *effectivités*.

**(vii) Malaysian Petroleum Agreement, 1968**

Malaysia put forward that in 1968 it concluded an agreement with the Continental Oil Company of Malaysia authorising the company to explore for petroleum in the boundaries of the Continental Shelf of Malaysia on the east coast of West Malaysia. The implication of this decision was that Pedra Branca/Pulau Batu Puteh was included in the area of exploration. The Court rejected Malaysia's argument on the following grounds (para 253):

Given the territorial limits and qualifications in the concession and the lack of publicity of the co-ordinates, the Court does not consider that weight be given to this concession.

### **(viii) Malaysia's 1969 Legislation Extending Territorial Waters to 12 Nautical Miles**

Based on the 1958 Geneva Convention on the Territorial Sea, Malaysia passed legislation in 1969 extending its territorial waters from three to 12 nautical miles. Malaysia asserted that this extension included Pedra Branca/Pulau Batu Puteh and Singapore made no protest. Singapore's reply was that the legislation concerned did not identify baselines and outer limits of territorial waters and there was no chart or map published. When Malaysia did publish the map in 1979, Singapore protested as mentioned earlier, on 14 February 1980, which was taken as the Critical Date of the dispute. The Court again rejected Malaysia's position on the grounds that the legislation was too general and there was no map (para 256).

Other areas of conduct of the Parties considered by the ICJ were related to the 1970 Territorial Sea Agreement between Malaysia and Indonesia, the Indonesia-Singapore Territorial Sea Agreement 1973, inter-state cooperation between Indonesia, Malaysia and Singapore in the Malacca and Singapore Straits, official publications describing territories and islands and official maps. On almost all issues the Court was of the opinion that these acts did not contribute materially to support Malaysia's case while they tended to have the opposite effect for Singapore's claim. This article does not intend to discuss all these in detail, except the one on official maps, which is considered to be important.

More than 100 maps were submitted by both parties. However, none of the maps published by Singapore before the Critical Date included Pedra Branca/Pulau Batu Puteh as lying within Singapore's territory. As far as maps published by Malaysia were concerned, Singapore drew the Court's attention to six published respectively in 1962, 1965, 1970, 1974 and 1975. On this, Singapore brought to the attention of the Court that all these six maps included Pedra Branca/Pulau Batu Puteh with the words "Singapore" or "Singapura" appearing under it. Singapore argued that these maps were "significant admissions against interest by Malaysia" (para 269).

However, Malaysia's reply was basically that these were not treaty based maps and therefore did not create title and that they contained a disclaimer which says that they must not be considered an authority on the delimitation of international or other boundaries. The Court's ruling on this matter was that the maps published by Malaysia from 1962 to 1975 tended to confirm that Malaysia considered that Pedra Branca/Pulau Batu Puteh was under the sovereignty of Singapore.

In evaluating the conduct of the Parties from 1953 to 1980, a few observations can be made. Due to the ambiguity of the correspondence between 1844 and 1952 and the paucity of state activities by both sides pertaining to the island in question, the Court gave special attention to the period 1953 to 1980. Singapore's activities during the later phase were numerous and many had the character of acts *à titre de souverain* and not just related to the operation and maintenance of the lighthouse. On the other hand, Malaysia had few such activities. As a matter of fact, on many instances, such as the Acting State Secretary of Johor's letter of 1953 and the maps of 1962 to 1975, were detrimental to Malaysia's interest. Malaysia and its predecessors always took very precise and immediate action when it concerned its

sovereignty over Pulau Pisang but in the case of Pedra Branca/Pulau Batu Puteh, Malaysia's actions, responses and reactions were, either guarded, vague, or almost non-existent. Were these actions a portrayal of uncertainty or a sub-conscious admission or an acceptance that the island belonged to Singapore? Anyway this inaction, whether born out of uncertainty or a sub-conscious acceptance, proved very costly for the country as it caused Malaysia to eventually lose its case. The final verdict of the ICJ was as follows:<sup>15</sup>

The question to which the Court must now respond is whether in the light of the principles and rules of international law it stated earlier and of the assessment it has undertaken of the relevant facts, particularly the conduct of the Parties, sovereignty over Pedra Branca/Pulau Batu Puteh passed to the United Kingdom or Singapore.

The conduct of the United Kingdom and Singapore was, in many respects, conduct as operator of Horsburgh lighthouse, but that was not the case in all respects. Without being exhaustive, the Court recalls their investigation of marine accidents, their control over visits, Singapore's installation of naval communication equipment and its reclamation plans, all of which include acts *à titre de souverain*, the bulk of them after 1953. Malaysia and its predecessors did not respond in any way to that conduct, or the other conduct with that character identified earlier in this judgment, of all of which (but for the installation of the naval communication equipment) it had notice.

Further, the Johor authorities and their successors took no action at all on Pedra Branca/Pulau Batu Puteh from June 1850 for the whole of the following century or more. And, when official visits (in the 1970s for instance) were made, they were subject to express Singapore permission. Malaysia's official maps of the 1960s and 1970s also indicate an appreciation by it that Singapore had sovereignty. Those maps, like the conduct of both Parties which the Court has briefly recalled, are fully consistent with the final matter the Court recalls. It is the clearly stated position of the Acting Secretary of the State of Johor in 1953 that Johor did not claim ownership of Pedra Branca/Pulau Batu Puteh. That statement has major significance.

The Court is of the opinion that the relevant facts, including the conduct of the Parties, previously reviewed and summarized in the two preceding paragraphs, reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh. The Court concludes, especially by reference to the conduct of Singapore and its predecessors *a titre de souverain*, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors, that by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh has passed to Singapore.

For the foregoing reasons, the Court concluded that sovereignty over Pedra Branca/Pulau batu Puteh belongs to Singapore.

#### **b. Sovereignty over Middle Rocks**

After deliberating on the issue of Pedra Branca/Pulau Batu Puteh, the question of sovereignty over Middle Rocks and South Ledge became much easier for the ICJ



to decide upon. As far as Singapore was concerned, its position was that whosoever obtained sovereignty over Pedra Branca/Pulau Batu Puteh should also be awarded sovereignty over both, Middle Rocks and South Ledge. The basis of Singapore's arguments was centred on three major arguments. Firstly, Singapore argued that both geographically and geomorphologically, the three formed a single group of maritime features with Middle Rocks and South Ledge being dependencies of Pedra Branca/Pulau Batu Puteh. Secondly, Singapore argued that Malaysia was unable to show that it had appropriated Middle Rocks and South Ledge through any acts of sovereignty, and lastly, that both the two features fell within the territorial waters generated by Pedra Branca/Pulau Batu Puteh, which in fact, Singapore owned.<sup>16</sup>

Malaysia on the other hand stated its case on two major arguments namely, first, that the three features did not form one identifiable group of islands historically or geographically, and, second, that Malaysia had exercised consistent acts of sovereignty over both these features.<sup>17</sup>

The Court's view was, however, fairly simple. The issue of Middle Rocks had to be decided on the basis of legal grounds similar to that of Pedra Branca/Pulau Batu Puteh. As such, the Court implied that Singapore's geographical dependency basis could not be applied. On legal grounds, the Court's ruling was that just like Pedra Branca/Pulau Batu Puteh, Johor had the original legal title to Middle Rocks but this title had not been challenged on the basis of *effectivités* by Singapore as it had argued in the case pertaining to Pedra Branca/Pulau Batu Puteh. Therefore, Malaysia's original title has never been displaced and by virtue of this fact, sovereignty over Middle Rocks remained with Malaysia. The exact wording of the Court's verdict on Middle Rocks is as follows:<sup>18</sup>

Since Middle Rocks should be understood to have had the same legal status as Pedra Branca/Pulau Batu Puteh as far as the ancient original title held by the Sultan of Johor was concerned, and since the particular circumstances which have come to effect the passing of title to Pedra Branca/Pulau Batu Puteh to Singapore do not apply to this maritime feature, original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor, unless proven otherwise, which the Court finds Singapore has not done.

### **c. Sovereignty over South Ledge**

South Ledge could not be judged in the same manner as Pulau Batu Puteh and Middle Rocks because it is a low-tide elevation which according to UNCLOS, Article 13 is, "a naturally formed area of land which is... above water at low tide but submerged at high tide."<sup>19</sup> Also according to past cases judged by the ICJ, low-tide elevations are generally not considered to be territory in the same sense as islands which are subject to rules and principles of territorial acquisition. As such, these features do not also have territorial seas of their own – they will have to be considered on the basis of which country's territorial waters they are located.

Malaysia's contention was that South Ledge was situated 1.7 nautical miles from Middle Rocks and 2.2 nautical miles from Pulau Batu Puteh. As such, it would

fall “within the territorial sea appertaining to Middle Rocks.”<sup>20</sup> Singapore argued that South Ledge could not be subject to separate appropriation. The Court ruled as follows:<sup>21</sup>

In view of its previous jurisprudence and the arguments of the Parties, as well as the evidence presented before it, the Court will proceed on the basis of whether South Ledge lies within the territorial waters generated by Pedra Branca/Pulau Batu Puteh, which belongs to Singapore, or within those generated by Middle Rocks, which belongs to Malaysia. In this regard the Court notes that South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca/Pulau Batu Puteh and Middle Rocks.

The Court recalls that in the Special Agreement and in the final submissions it has been specifically asked to decide the matter of sovereignty separately for each of the three maritime features. At the same time the Court has not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question.

In these circumstances, the Court concludes that for reasons explained above sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located.

## Implications

It becomes immediately clear that the implications of the three Judgments are enormous. Let me start with the specific before going on to the general. One question that was asked, and is still being asked, by observers, is whether Pulau Batu Puteh and Middle Rocks are islands, or rocks. This is important because the currently held view is that only islands, and not rocks, can generate territorial seas (12 nautical miles). The speculation became rife due to a number of factors. One is the nature of the names of these features itself. Both seem to emphasize the “rock” element! The definition provided by UNCLOS is also somewhat ambiguous. It is worded as follows:<sup>22</sup>

### *Article 121 Regime of islands*

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Sub-section (3) of the article says rocks do not have EEZS, but it is silent on the issue whether they generate territorial waters. If we use the definition in the first paragraph, both Pulau Batu Puteh and Middle Rocks qualify as islands. If we apply the third paragraph, obviously both of them cannot sustain human habitation or economic life of their own and therefore come under the category of rocks. Based on this last description, Maritime Institute of Malaysia (MIMA) Director-General, Datuk Cheah Kong Wai, opined that Pulau Batu Puteh is a rock and therefore did not generate any maritime zones.<sup>23</sup>

The ICJ in the present case gave the following interpretation. In this context, this article would like to draw attention to the Court's ruling on South Ledge, especially paragraph 297. To quote the relevant parts of this section again:<sup>24</sup>

[T]he Court will proceed on the basis of whether South Ledge lies within the territorial waters generated by Pedra Branca/Pulau Batu Puteh ... or within those generated by Middle Rocks...

Without mentioning whether Pulau Batu Puteh or Middle Rocks were either islands or rocks, the Court clearly ruled that both of them will generate territorial waters and nothing more. In fact, this was the basis on which the question of sovereignty over South Ledge was decided: "South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca/Pulau Batu Puteh and Middle Rocks."<sup>25</sup> The controversy must end there, whether we consider the Court's verdict as ambiguous or flawed.

Both countries can therefore now declare the respective limits of the territorial waters generated by each island, but will have to sort out the attending problems connected with overlapping national waters; control over sea resources; right of passage; and not to forget, an agreement on the sovereignty of South Ledge.

Immediately after the ICJ decisions were delivered, Malaysia and Singapore established a joint technical committee for the purpose of ironing out some of these problems. However a Singapore Minister who probably did not read the Court's verdict clearly announced that the Republic was intending to declare the limits of its territorial sea and EEZ from Pulau Batu Puteh and that it would negotiate with neighbouring countries if there was an overlap.<sup>26</sup> There was strong reaction in Malaysia. Some political leaders called this action as an "act of provocation", while Datuk Seri Rais Yatim, Malaysia's Minister of Foreign Affairs, stated that the news was "...new to us. Singapore has not brought up the matter during previous meetings..."<sup>27</sup>

So what was the joint technical committee tasked to do? Both countries should therefore read the ICJ judgment in a more precise manner to avoid public speculation and prevent tensions rising between the two neighbours.

Now coming to the implications and importance of the lost letter of 1844 from Governor William J. Butterworth which Tan Sri Abdul Kadir Mohamad said he had been searching for the past 18 years. The letter from the governor to the Sultan and the Temenggong of Johor was said to be seeking permission to build the

Horsburgh Lighthouse on Pulau Batu Puteh. Datuk Seri Rais Yatim said Malaysia would call for a judicial review of the case if the letter was located, the maximum period for such a review being ten years.<sup>28</sup>

How this letter would help Malaysia remains a major question. Even if the letter was found within the next few years and it turns out that indeed Governor Butterworth was seeking permission to build the lighthouse, what legal weight will it carry, especially as the replies from the Sultan and the Temenggong were found to be vague, general and inconclusive? There were also no conditions mentioned in these replies. As has been discussed earlier, the Court pointed out that Malaysia has not been able to produce a resulting agreement spelling out the obligations and rights of the two parties pertaining to the construction and operation of the lighthouse on Pedra Branca/Pulau Batu Puteh.<sup>29</sup> Can the Malaysian authorities therefore widen the scope of their search if they are serious of reopening the case?

In terms of the more general implications, the following observations can be made. Firstly, after studying both the Pulau Sipadan/Pulau Ligitan and the present case, the possession of legal title is paramount for winning sovereignty over disputed islands. The ICJ gives paramount and priority consideration to legal title. The best example is the ICJ's ruling on Middle Rocks. Malaysia had original title and never lost it and therefore was awarded sovereignty over that island. However, there are a number of qualifications, not disclaimers. A country can prove having original title but that country can lose the title concerned, if it behaved like an absentee landlord, and the tenant, unfortunately for the lessor, behaved like the owner. Hence, the landlord will lose both *de jure* and *de facto* control over its property, as is the case with Pedra Branca/Pulau Batu Puteh. In some cases, silence can be dangerous. According the ICJ, the law on inaction is as follows:<sup>30</sup>

Under certain circumstances, sovereignty over territory might pass as a result of the *failure of the state which has sovereignty to respond to conduct à titre de souverain* of the other State or, as Judge Huber put it in *Island of Palmas* case, to concrete manifestations of the display of territorial sovereignty by the other state (*Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, RIAA, Vol. II, p. 839). Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. The concept of acquiescence "is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent..." (*Delimitation of the Maritime Boundary in the Gulf Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 305, para. 130). That is to say, silence may also speak, but only if the conduct of the state calls for a response.

It is also difficult to prove title, although one party may have more compelling evidence. In the Pulau Sipadan/Ligitan case, Malaysia's evidence was very strong, but the ICJ still ruled that the evidence was insufficient to prove title. The rule of the thumb, however, is that a contestant, whether it has convincing evidence or not, must plead on grounds of title. Singapore, in the present case, had little in terms of

having title, but still fought its case on this argument. The same rule applies to *effectivités*, state action or acts *à titre de souverain*. There must always be a fallback position. In fact, Malaysia won the Pulau Sipadan/Ligitan case based on this fallback position. In the present case, Malaysia did not plead on *effectivités* probably because it felt very confident about its title. The Court, however, still gave the benefit of the doubt and reviewed Malaysia's *effectivités* as well, although they were rather weak and, in some cases, proved detrimental, such as the maps showing Pedra Branca/Pulau Batu Puteh as belonging to Singapore, but with a disclaimer. Strong state activities by Singapore and weak ones by Malaysia resulted in sovereignty over Pedra Branca/Pulau Batu Puteh to be awarded to Singapore.

By now, it is obvious that resolving issues concerning sovereignty over maritime features alone is not enough. In fact, it can lead to more complications and even result in naval confrontations between the contending parties, as was the case with the Pulau Sipadan/Ligitan. The reference here is to the problem of unresolved maritime boundaries that still remain after the sovereignty issue has been settled. The complications the parties involved in the present case are facing, is another example. What is confounding, however, is why the parties involved in both the cases did not give the ICJ the mandate to delineate such boundaries as well. In fact, the absence of such a mandate, the Court commented, led it to deliver the judgment on South Ledge, which in a way is still inconclusive. Perhaps it is true that after all Asian nations do enjoy fishing in troubled waters.

## End Notes

<sup>1</sup> The United Nations Law of the Sea Convention (UNCLOS) Treaty was concluded on 10 December 1982, and came into force in 1994. See Mark J. Valencia, *Malaysia and the Law of the Sea: The Foreign Policy Issues, the Options and their Implications*, Kuala Lumpur: Institute of Strategic and International Studies (ISIS) Malaysia, 1991, p. 1.

<sup>2</sup> R. Haller-Trost, *The Territorial Dispute between Indonesia and Malaysia over Pulau Sipadan and Pulau Ligitan in the Celebes Sea: A Study in International Law*, Durham: International Boundaries Research Unit (IBRU), University of Durham, 1995, pp. 4-5.

<sup>3</sup> See D. S. Ranjit Singh, "Boundary Delineation in the Sabah-Indonesia-Philippine Region: The Sipadan and Ligitan Case at the ICJ," *Adrem* (Journal of the Selangor Bar), Vol. 1, 2006, pp. 31-41.

<sup>4</sup> See Press Statement by the Chairperson of the 9<sup>th</sup> ASEAN Summit and the 7<sup>th</sup> ASEAN +3 Summit Bali, Indonesia, 7 October 2003, pp. 1-5; and Declaration of ASEAN Concord II (Bali Concord II), pp. 1-6.

<sup>5</sup> *The Star*, 24 May 2008.

<sup>6</sup> *Judgment, Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge, (Malaysia/Singapore)*, The Hague: International Court of Justice (ICJ), 23 May 2008, para 34, p. 17.

<sup>7</sup> *Ibid.*, para 7, p. 8.

<sup>8</sup> *New Straits Times*, 24 May 2008.

<sup>9</sup> *Judgment, Sovereignty over Pedra Branca*, para 39 and 40, p. 18.

<sup>10</sup> *Ibid.*, para. 37 and 38, pp. 17-18.

<sup>11</sup> *Ibid.*, para. 117, p. 36.

<sup>12</sup> *Ibid.*, para. 145, p. 44.

<sup>13</sup> *Ibid.*, para. 158, p. 48.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, para. 273-277, pp. 74-75.

<sup>16</sup> *Ibid.*, para. 279-283, p. 76.

<sup>17</sup> *Ibid.*, para. 284-287, p. 77.

<sup>18</sup> *Ibid.*, para. 290, p. 78.

<sup>19</sup> *The Law of the Sea*, New York: United Nations, 1983.

<sup>20</sup> *Judgment, Sovereignty over Pedra Branca*, para. 293, p. 78.

<sup>21</sup> *Ibid.*, para. 297-299, p. 79.

<sup>22</sup> *The Law of the Sea*, article 121.

<sup>23</sup> *Sunday Star*, 25 May 2008.

<sup>24</sup> *Judgment, Sovereignty over Pedra Branca*, para. 297, p. 79.

<sup>25</sup> *Ibid.*, para. 297, p. 79.

<sup>26</sup> *The Star*, 29 May 2008.

<sup>27</sup> *The Star*, 23 July 2008 and 24 July 2008.

<sup>28</sup> *The Sunday Star*, 1 June 2008.

<sup>29</sup> *Judgment, Sovereignty over Pedra Branca*, para 145, p. 44.

<sup>30</sup> *Ibid.*, para. 121, p. 37.